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BEFORE THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
HEARING ON SUPREME COURT'S RULING IN *SACKETT v. U.S. ENVIRONMENTAL PROTECTION AGENCY*

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On January 18, 2023, EPA and the Corps of Engineers published a final rule defining "waters of the United States" (WOTUS) under the Clean Water Act despite the fact that a case on that issue was pending on the Supreme Court's docket. The January rule adopted both a "significant nexus test" and a "relatively permanent waters" test for jurisdiction. That rule is the subject of numerous challenges and is stayed in 27 states.

On May 25, 2023, the Supreme Court addressed the scope of Clean Water Act jurisdiction in *Sackett v. EPA*. All nine justices agreed that "significant nexus" is not a legitimate basis for establishing Clean Water Act jurisdiction. All nine justices agreed that the Sackett's property in Idaho, at issue in the case, is not regulated by the Clean Water Act.

The Sackett property is separated from a large wetland to the north by a road and from Priest Lake to the south by dry land and a row of houses. If you considered groundwater to be a connection, the Sackett property would be connected to both the wetland and the lake. However, no justice argued the Sackett property was regulated on that or any other basis. Three Justices wrote concurring opinions.

In the majority opinion, Justice Alito (joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Barrett) held that only relatively permanent waters that

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are connected to traditional navigable waters are waters of the United States (WOTUS). The majority opinion also held that a wetland is regulated only if it has a continuous surface connection to a body of water that is a WOTUS.

Justice Kavanaugh (joined by Justices Sotomayor, Kagan, and Jackson) concurred in the judgment that significant nexus is not a valid test of jurisdiction and that the Sackett's property is not regulated. But his concurring opinion also says under the Clean Water Act jurisdiction extends to wetlands separated from a WOTUS by a man-made barrier or a natural berm, dune, or the like.

Although the liberal wing of the Court joined Justice Kavanaugh's opinion, Justice Kagan (joined by Justices Sotomayor, Kagan, and Jackson) wrote a separate concurring opinion to embrace the concept of jurisdiction over "neighboring" wetlands and to criticize recent opinions of the conservative justices, including the *West Virginia v. EPA* opinion from last term that articulated the "major questions" doctrine.

Justice Thomas wrote a concurring opinion (joined by Justice Gorsuch) to say that he interprets the terms "navigable" and "of the United States" to limit Clean Water Act jurisdiction to traditional navigable waters and wetlands directly abutting those waters, based on the limits of Congress' traditional "channels-of-commerce" navigation authority.

On September 8, 2023, EPA and the Corps of Engineers issued a direct final rule (no notice and comment) to respond to *Sackett*. The final rule revises the January 2023 WOTUS regulatory text to removal all language pertaining "significant nexus." It deletes interstate wetlands from the category of interstate waters. Finally, it amends the definition of "adjacent" to mean "having a continuous surface connection." The Biden Administration's rule is in effect in 23 states and the District of Columbia, where the January 2023 rule is not stayed. In the other 27 states, the agencies are saying that they will implement the pre-2015 regulatory regime as modified by the *Sackett* opinion.[2]

I wish to make four major points.

[2] Given the January rule's reliance on case-by-case jurisdictional determinations, this distinction is unlikely to make a difference in implementation.

First, Supreme Court got it right in *Sackett*. A jurisdictional test based on "significant nexus" is not supported by the statute and therefore is not valid. Further, the background of the 1972 Clean Water Act makes it clear that the "relatively permanent waters" test from the plurality opinion in the 2006 case, *Rapanos v. U.S.*, which was adopted by the *Sackett* majority, is consistent with the text and legislative history of the Clean Water Act.

Second, the Biden Administration's September 2023 "conforming" rule fails to fully implement the *Sackett* decision.

Third, the sky is not falling. Recognizing the limits on Clean Water Act jurisdiction does not mean all wetlands will be filled in or waterways will become polluted. There are multiple tools available to protect wetlands. And the *Sackett* case did not change the fact that point sources are regulated. So, even if a ditch is not regulated as a WOTUS, if it discharges to a stream or lake or other WOTUS, it that discharge is still subject to the Clean Water Act.

Finally, amending the Clean Water Act to extend to isolated waters and wetlands could exceed Congress' authority under the Commerce Clause.

I. The Sackett Opinion is Consistent with the Text and Legislative History of the Clean Water Act.

The *Sackett* case adopts the view from the *Rapanos* decision that the term "waters" reaches "'only those relatively permanent, standing or continuously flowing bodies of water "'forming geographic[al] features'" that are described in ordinary parlance as "streams, oceans, rivers, and lakes."'" *Rapanos v. United States*, 547 U. S. 715, 739 (2006) (plurality opinion).

The historical context of the 1972 amendments makes it clear that this view of the scope of Clean Water Act jurisdiction is consistent with what the drafters of the Clean Water Act envisioned in 1972. This point is explained in detail in the attached article entitled "Examining the Term 'Waters of The United States' in Its Historical Context."

As I note in that article, the House and the Senate had different views on the Clean Water Act regulatory program and its reach. The House Public Works

Committee envisioned a program led by the Corps of Engineers while the Senate Public Works Committee wanted to give regulatory authority to the newly created Environmental Protection Agency. The compromise in the final bill was the § 402 program administered by EPA and authorized states and the § 404 program administered by the Corps. The House and Senate also disagreed over the scope of federal jurisdiction. Both limited the regulatory authority of the Act to "navigable waters." However, the House bill defined "navigable waters" as "the navigable waters of the United States." The Senate bill defined navigable waters as "the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes."

The compromise language in the final bill defined "navigable waters" as "waters of the United States." The legislative history and historical background of the 1972 amendments to the Clean Water Act make it clear that both the House and Senate intended to go beyond administrative interpretations of the Corps' Rivers and Harbors Act jurisdiction (which included the so-called "Refuse Act" that prohibited dumping waste into navigable waterways without a permit that was a predecessor to the Clean Water Act). According to those Corps and EPA administrative interpretations, the term "navigable waters of the United States" is distinct from "navigable waters of the States" and therefore did not cover navigable waters that did not connect other navigable waters, forming a water highway for the interstate movement of goods. Members of Congress disagreed and did not want Clean Water Act jurisdiction to be so limited.

The definition of navigable waters in the Clean Water Act is famously ambiguous. It is silent on tributaries. It is silent on wetlands. However, it clearly is an exercise of Congress' authority over navigation as well as interstate commerce. As noted by the Supreme Court in the 2001 case, *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers,* 531 U.S. 159, 172 (2001), you cannot read "navigable" out of the statute and regulate waters based wholly on Congress' Commerce Clause authority.

After the *Rapanos* case was decided in 2006, the Senate staff who worked on the 1972 Clean Water Act expressed the view that the decision was consistent with the intent of Congress. As Leon Billings, Senator Muskie's Democrat majority counsel for the Senate Public Works Committee, wrote in a 2015 Maine Law Review article honoring Senator Muskie: "the Supreme Court has acknowledged a

scope that is at least as far as we had imagined and, in my view, broader than we had reason to hope." In a 2015 interview with the Environmental Law Institute, Mr. Billings further said that at the time of their negotiations the House and Senate staff had believed that scope the federal jurisdiction authorized by the 1972 amendments was more constrained than the scope identified by the Supreme Court in both *SWANCC* and *Rapanos*.

In 1972, while giving the Clean Water Act a jurisdictional reach that exceeded contemporaneous agency interpretations of the Corps' Rivers and Harbors Act authority, at no time did Congress consider regulating isolated, non-navigable intrastate water, rainwater runoff and ephemeral flows, groundwater, or waters based solely on their use as wildlife habitat. In fact, the 1973 report issued by the congressionally chartered National Water Commission *after* the enactment of the current definition of "waters of the United States," recommended that states protect state-owned wetlands used by waterfowl. None of the water experts who served on the Commission suggested that those wetlands were already regulated by the federal government.

Consistent with the legislative history of the Act discussed above, the Commission described the jurisdictional expansion in the 1972 amendments as follows: "The water quality standards established in response to the 1965 Water Quality Act are retained as a floor under the new effluent limitations and are expanded to include all navigable waters." The Commission further noted that permits for dredging and channel alteration issued by the Corps of Engineers "are required only when the waters are navigable in interstate or foreign commerce, and no application for a Corps permit need be filed for those activities in other inland waters." As a result, the Commission made the following recommendation: "Since the States historically have been viewed as having regulatory jurisdiction over waters which are not navigable in interstate or foreign commerce, the Commission believes that the States should enact statutes which would provide adequate measures of protection to fish and wildlife values."

In *Sackett,* the Supreme Court has adopted a broader interpretation of Clean Water Act jurisdiction than identified by the National Water Commission in 1973. It also adopted a broader view of jurisdiction over wetlands than that articulated by the Commission.

While the *Sackett* majority interpreted "adjacent" to mean "abutting" it also upheld jurisdiction over wetlands that abut tributaries and other non-navigable waters if they are relatively permanent and are connected to a navigable water. This interpretation was not compelled by § 404(g), which was added to the Clean Water Act in 1977 to allow states to assume the § 404 permitting program. That section only says that regulation of discharges into traditional navigable waters and wetlands adjacent to traditional navigable waters must remain regulated by the Corps of Engineers and cannot be assumed by states. Section 404(g) is silent as to other wetlands and thus has no bearing on whether wetlands adjacent to non-navigable waters are regulated under § 404.

Further, jurisdiction over wetlands abutting non-navigable relatively permanent waters also was not compelled by the precedent set by the Supreme Court in *United States v. Riverside Bayview Homes, Inc.,* 474 U. S. 121 (1985). In *Riverside Bayview*, the Court deferred to a decision by the Corps that a wetland that actually abutted a traditional navigable water was jurisdictional, acknowledging the difficulties in discerning where land ends and water begins.

Thus, while it is certainly narrower than the ever-expanding jurisdiction claimed by EPA and the Corps, the *Sackett* opinion interprets the jurisdiction of the Clean Water Act broadly, while remaining true to both the text and the legislative history of the Act.

II. Biden Administration's September 2023 "conforming" rule fails to fully implement the *Sackett* decision.

The final rule issued in September 2023 to revise the January 2023 WOTUS rule to conform to the *Sackett* decision fails to fully implement that decision.

For example, EPA and the Corps left "interstate waters" as an independent category of jurisdictional waters, whether nor not such waters are navigable or relatively permanent and connected to an interstate navigable water. This decision fails to implement the following limitation in the *Sackett* opinion: "While its predecessor encompassed "interstate or navigable waters," 33 U. S. C. §1160(a) (1970 ed.), the CWA prohibits the discharge of pollutants into only "navigable waters," which it defines as "the waters of the United States, including the territorial seas," 33 U. S. C. §§1311(a), 1362(7), (12)(A) (2018 ed.)." Slip op. at

4. It is difficult to understand how defining WOTUS to include interstate waters as a separate category of jurisdictional waters fits into the holding of the *Sackett* Court that a water of the United States must be "a relatively permanent body of water connected to traditional interstate navigable waters." Slip op. at 22.

In addition, EPA and the Corps left untouched the expansive definitions of "tributary," "relatively permanent," and "continuous surface connection" found in the preamble to the January 2023 WOTUS rule.

According to the January 2023 preamble, to identify a tributary, all EPA and the Corps need to do is to "be able to trace evidence of a flowpath downstream." 88 Fed. Reg. at 3079. That flowpath does not need be a water of the United States. 88 Fed. Reg. at 3079, 3084. It can include ephemeral flows. 88 Fed. Reg. at 3084. "A tributary may flow through another stream that flows infrequently, and only in direct response to precipitation, and the presence of that stream is sufficient to demonstrate that the tributary flows to a paragraph (a)(1) water." Id. In fact, according to the preamble, "[t]ributaries are not required to have a surface flowpath all the way down to the paragraph (a)(1) water" and the flowpath may include subsurface flow. Id.

Once the agencies identify a tributary, they must then decide whether the tributary is "relatively permanent." According to the January 2023 preamble, this determination can be based on runoff from "a concentrated period of back-to-back precipitation events." 88 Fed. Reg. at 3086-87. The agencies also can determine that a stream is "relatively permanent" based on the identification of a bed and bank – *the same test that the agencies previously used to regulate ephemeral flows* -- or the presence of water-stained leaves, hydric soils, floodplains, algae, benthic macroinvertebrates, and other hydrologic and biologic indicators – *the same indicators used to identify wetlands*. 88 Fed. Reg. at 3087-88.

When you put it all together, EPA and the Corps are saying that if the upper reach of a stream is considered "relatively permanent" then they can regulate that upper reach as long as a flowpath (even if a dry channel or subsurface flow) extends to a "water of the United States." It is not outside the realm of possibility that they will try to regulate the entire "flowpath," even parts that are not "relatively permanent."

Further, it is remarkable that EPA and the Corps are continuing to claim that identification of an ordinary high-water mark is a basis for jurisdiction. That basis for jurisdiction was denounced by both the plurality decision in *Rapanos* and Justice Kennedy's decision.[3] It appears to have no grounding in the *Sackett/Rapanos* "relatively permanent waters" test.

The treatment of wetlands in the January 2023 preamble is similarly questionable. Following *Sackett,* it is clear that wetlands are not an independent category of "waters of the United States" and are regulated only when, as a result of a "continuous surface connection," the wetlands are indistinguishable from a "water of the United States." The rationale used in *Rapanos* and adopted by *Sackett* to support the regulation of wetlands is the recognition that the demarcation where water ends and land begins is not always clear. *Rapanos* at 742, 755; *Sackett*, slip op. at 21-22.

However, it appears that EPA and the Corps do not plan to implement that line-drawing exercise. Under their January 2023 rule preamble, a wetland can be clearly distinguishable from a "water of the United States" and still be regulated. The agencies will require only a physical connection between a wetland and a "water of the United States." That connection does not need to be a "water of the United States" itself. It can be a feature on the landscape identified by tools such as NRCS soil maps, LIDAR, and satellite imagery. It does not even need to be wet. 88 Fed. Reg. at 3095-96.

Based on that preamble language we may soon see the same expansive claims of jurisdiction we have seen in the past. For example, in a March 30, 2004, hearing of the Water Resources and Environment Subcommittee of the House Committee

[3] 547 U.S. at 725 (criticizing the Corps' use of an ordinary high water mark to establish jurisdiction noting that "[t]his interpretation extended 'the waters of the United States' to virtually any land feature over which rainwater or drainage passes and leaves a visible mark--even if only 'the presence of litter and debris'") (plurality opinion); 547 U.S. at 781 (criticizing use of an ordinary high water mark to delineate tributaries because "breadth of this standard--which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it--precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood" (J. Kennedy, concurring).

on Transportation and Infrastructure on "Inconsistent Regulation of Wetlands and Other Water," one witness testified that a Corps official used a 25-year-old skidder rut that connected a wetland to a ditch to a stream to justify regulation. Under the preamble to the January 2023 rule, Corps officials would remain free to conclude that a skidder rut and a ditch together form a continuous surface connection that subjects a wetland to federal jurisdiction.

Given the fact that these interpretations are based on preamble language, not definitions in the rule itself, they might not be judicially reviewable until they are applied to a specific situation. If past is precedent, as EPA and the Corps make their case-by-case regulatory determinations we may end up seeing same regulatory creep, inconsistency, and confusion that we have seen before.[4]

EPA and the Corps did not take comment on their interpretation of the *Sackett* opinion, citing the APA "good cause" exception from the requirement for notice and comment where those procedures are unnecessary. This argument implies that the August rule is the only response they could have made. That assertion does not appear to be well-grounded.

III. Other Wetlands Protections.

The Sackett court's refusal to endorse broad claims of jurisdiction does not mean a fundamental shift in wetlands protections.

First, while claiming the authority to do so, EPA and the Corps have not attempted to assert jurisdiction over isolated waters and wetlands since the 2001 Supreme Court decision in *SWANCC*.[5] Clarifying that such waters are not regulated merely reflects the status quo. In fact, in 2014, the U.S. Fish and Wildlife Service acknowledged that 88% of prairie potholes are isolated and therefore not regulated. Instead of using regulatory authorities, they work with farmers

[4] GAO, Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction (Feb. 2004 (GAO-04-297) (identifying inconsistencies among Corps offices).
[5] 86 Fed. Reg. at 69,440 (Dec. 7, 2021) ("As a matter of practice since the issuance of the SWANCC Guidance [in 2003], the Corps has not asserted jurisdiction over such 'other waters'").

throughout the upper Midwest on cooperative conservation measures to address habitat.[6]

Second, the CWA includes nonregulatory programs that address waters that are not "waters of the United States" subject to federal regulation. In fact, the policies and goals listed in § 101(a) include "the national policy that areawide treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State," a provision of the Act that expressly addresses waters that are *not regulated* at the federal level.[7]

Third, there are many federal programs that protect habitat and wetlands. The Endangered Species Act protects endangered and threatened species and related critical habitat. 16 U.S.C. §§ 1531 et seq. The North American Wetlands Conservation Act authorizes a grant program to carry out projects to protect and manage wetland habitats for migratory birds and other wetland wildlife in the United States. 16 U.S.C. §§ 4401 et seq. The Department of Agriculture's conservation programs create incentives to protect wetlands.

Fourth, non-federal organizations play a strong role as well. Ducks Unlimited works with partners, including rice farmers, to protect waterfowl habitat. The Nature Conservancy buys land for conservation purposes. Numerous local watershed organizations work together to protect water quality, including promoting practices that protect shorelines.

Finally, states can adopt their own definitions of "waters of the state" and most have done so. A 2022 Environmental Law Reporter article reported that 26 states have adopted programs to protect those waters.[8] The other 24 states rely on their authority under § 401 authority to review federal actions and attach conditions to protect state waters.

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[6] See Dahl, T.E. 2014. Status and trends of prairie wetlands in the United States 1997 to 2009. U.S. Department of the Interior; Fish and Wildlife Service, Ecological Services, Washington, D.C., at 48.

[7] CWA § 101(a)(5), referring to § 208 of the Act, which encourages the development of plans to address "substantial water quality control problems," including identifying pollution problems associated with nonpoint sources, saltwater intrusion, and pollution of groundwater, all of which fall outside the regulatory reach of the Act. *See* CWA §§ 208(a)(1) and (b)(2)(F), (I), and (K).

[8] McElfish, J. "State Protection of Nonfederal Waters: Turbidity Continues," 52 ELR 10679 (2022).

IV. Amending the Clean Water Act to Encroach on Traditional State Authority May Exceed Congress' Commerce Clause Authority.

Just as happened after the *Rapanos* decision, the Biden Administration may ask Congress to amend the Clean Water Act to expand federal jurisdiction.[9] In response, some members of Congress introduced legislation to remove the term "navigable" from the CWA.[10] After that legislation failed to advance over the course of two Congresses, in 2011 the agencies changed their strategy and developed a draft guidance to reinterpret the *Rapanos* decision as an expansion, not a reduction, in federal authority.[11]

We may see an attempt to do that again. But in the unlikely event that Congress does pass legislation to revise the definition of waters of the United States, such a revision may not be constitutional. As noted by the Supreme Court in *SWANCC*, regulating intrastate activities based on a claim that they "substantially affect" interstate commerce is not firmly supported by the Commerce Clause and also raises federalism concerns.[12]

In 1972, members of this Committee had similar concerns. According to Leon Billings, Senator Muskie's staff, members of the Committee wanted to avoid claiming jurisdiction over isolated waters, due to concerns over constitutional limitations.

In sum, if this Committee wishes to aid the protection of isolated waters and wetlands, nonregulatory approaches may be more successful.

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[9] May 20, 2009, letter from CEQ Chairman Nancy Sutley, EPA Administrator Jackson, Acting Assistant Secretary of the Army Rock Salt, Agriculture Secretary Tom Vilsack, and Interior Secretary Ken Salazar to Senator Boxer.

[10] The Clean Water Restoration Act (HR 2421 and S. 1870 110th Congress; S. 787 111th Congress).

[11] EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act," 76 Fed. Reg. 24,479 (May 2, 2011). The 2011 guidance was the predecessor to the 2015 WOTUS rule.

[12] 531 U.S. at 173-74. In fact, such a statute could give Justice Thomas the opportunity to advance the position stated in his *Sackett* concurrence that "New Deal" expansion of Commerce Clause authority should be overturned.